

# Expressive Punishment and Political Authority

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*In this paper I consider a possible objection to the expressive or communicative theory of punishment. The objection centres on the state's right to punish—that is, according to the theories I am interested in, the state's right to intervene in a citizen's life and impose a sanction in order to express deserved condemnation. My question is twofold: 1) what view of state authority seems to be implied by the alleged right of the state to punish, and 2) is that view of state authority compatible with our best theories of how the state gains authority over its citizens? I begin by reviewing some different conceptions of what authority is. I argue that the expressive theory of punishment cannot co-opt simply any account of state authority in order to establish the right to punish. Because the right to punish must, on the expressive theory, include the right to issue deserved condemnation, the account of state authority implied by the expressive theory must include some account of (epistemic) moral authority. Nevertheless, epistemic authority is not enough by itself. It must be accompanied by political authority: the right to rule. I therefore suggest that, on the face of it, the expressive view is committed to a conception of state authority in which epistemic and political authority are united, such as on what I call the Solomon model, in which the ruler (Solomon) gains political authority because of his wisdom. However, if the expressive theory is committed to seeing the Solomon model as the ideal case of state authority, then it will understandably raise the hackles of liberals who see individual autonomy as a fundamental value: Solomon, one might think, is the ideal case of paternalistic authority. Having developed this criticism of the expressive view, I look at the resources of the expressive theory for dealing with it. I look at R.A. Duff's attack on the notion of content-independent authority as it applies to criminal law. However, I argue that content-independent authority is simply the right to rule and that Duff and other expressive theorists are committed to the state possessing such a right. Therefore, this move of Duff's will not solve the problem. A better solution, I argue, might lie in the idea of democratic authority. I*

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\* Department of Philosophy, University of Sheffield. A version of this paper was delivered at a symposium on Punishment and Human Rights organized by Jesper Ryberg at the University of Copenhagen in October 2010. I would like to thank the participants at the symposium for helpful discussion, in particular, Antony Duff, Alon Harel, Doug Husak, Andrew von Hirsch, and Matt Matravers. I have also had generous and helpful comments from Daniel Viehoff, Richard Dagger, Mary Sigler, and Caitlyn Nestleroth.

*briefly explore how some features of the Solomon model might be retained in the idea of democratic authority—thus making it compatible with the expressive theory—but in a manner that gives due respect to individual equality and autonomy.*

## I. INTRODUCTION

In this paper I will motivate and then attempt to address a criticism that might be made of the expressive theory of punishment. It concerns the question of political authority, and specifically the question of whether the expressive theory of punishment can fit with our most attractive accounts of political community and the authority of the state. In doing so, I attempt to fill a gap in the defence of the expressive theory that I (and others) have provided so far.<sup>1</sup> My aim is to show that the existence of this gap is accidental and that it does not reveal the expressive theory's inability to deal satisfactorily with the issue of political authority. However, in order to argue for this, I start by building up a *prima facie* case for thinking that the expressive theory might inherently be committed to an unsavoury model of state authority, which I call the Solomon model.<sup>2</sup> Providing an alternative to the Solomon model that meets the theoretical needs of the expressive theory occupies the second half of this paper. I give an account (albeit sketchy) of the account of authority associated with one version of democratic political theory and argue that the political community thus envisaged could appropriately have an expressive institution of punishment. If this account is successful, I will have given an attractive alternative to the Solomon model and shown that the expressive theory is not inherently tied to a problematic account of state authority.

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<sup>1</sup> I am grateful to Gabriel S. Mendlow for drawing my attention to this criticism. See Gabriel S. Mendlow, Review of *The Apology Ritual: A Philosophical Theory of Punishment*, NOTRE DAME PHIL. REVIEWS (Feb. 21, 2009), <http://ndpr.nd.edu/review.cfm?id=15287> (reviewing CHRISTOPHER BENNETT, *THE APOLOGY RITUAL: A PHILOSOPHICAL THEORY OF PUNISHMENT* (2008)). In acknowledging this debt, however, I do not mean to suggest that Professor Mendlow is committed to the interpretation of the criticism that I develop.

<sup>2</sup> The reference here is to the King Solomon of *I Kings* and *I Chronicles* in the Old Testament, famed for his wisdom:

And God gave Solomon wisdom and understanding exceeding much, and largeness of heart, even as the sand that is on the sea shore. And Solomon's wisdom excelled the wisdom of all the children of the east country, and all the wisdom of Egypt. For he was wiser than all men; than Ethan the Ezrahite, and Heman, and Chalcol, and Darda, the sons of Mahol: and his fame was in all nations round about. And he spake three thousand proverbs: and his songs were a thousand and five. . . . And there came of all people to hear the wisdom of Solomon, from all kings of the earth, which had heard of his wisdom.

*1 Kings* 4:29–34.

## II. POLITICAL AUTHORITY AND THE EXPRESSIVE THEORY OF PUNISHMENT

In this paper I am concerned with the expressive theory of punishment and the question of political authority.<sup>3</sup> The theory of punishment I am interested in sees the expression of deserved condemnation as the fundamental purpose of a system of punishment: the need to express such condemnation is the reason for having an institution that is distinctively concerned with retrospective punishment—as opposed, for instance, to an institution that is concerned with the pre-emption of crime or the defence of society against internal threat. The theory therefore regards the issuing, by the state, of deserved condemnation for wrongdoing as a final end rather than, as on the theories of Devlin and Durkheim, a means to a further end such as social solidarity.<sup>4</sup> We can refer to this type of view as non-instrumental expressionism, since it regards the expression of moral condemnation as the ultimate point of the exercise of state power in punishment.

I am interested in the question of political authority because I think that it is a useful way to focus one source of dissatisfaction with the expressive theory. The question we will be dealing with is whether the state has the right to deprive its citizens of freedom in order to condemn them when they violate its laws. In this section and the next, I will articulate this worry.

There are many other sources of potential dissatisfaction with the expressive theory, of course. One might worry, for instance, about the idea that human actions can be such as inherently to deserve condemnation. Are human beings responsible for their actions in the way this conception of desert requires?<sup>5</sup> One might also worry whether, even if wrongdoers do deserve condemnation, it is necessary that there be hard treatment or suffering involved. Proponents of non-instrumental expressionism take it that the need for condemnation justifies the need for punishment; hence their views can be seen as articulating what is most attractive in the retributivist nostrum that wrongdoers deserve punishment or suffering. But there is clearly a gap here that needs to be filled: why is it that the condemnation needs to be expressed through hard treatment?<sup>6</sup> Finally, one might

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<sup>3</sup> See CHRISTOPHER BENNETT, *THE APOLOGY RITUAL: A PHILOSOPHICAL THEORY OF PUNISHMENT* (2008); R.A. DUFF, *PUNISHMENT, COMMUNICATION, AND COMMUNITY* (2001) [hereinafter DUFF, *PUNISHMENT*]; R.A. DUFF, *TRIALS AND PUNISHMENTS* (1986) [hereinafter DUFF, *TRIALS*]; Joel Feinberg, *The Expressive Function of Punishment*, 49 *MONIST* 397 (1965); John Kleinig, *Punishment and Moral Seriousness*, 25 *ISR. L. REV.* 401 (1991); Igor Primoratz, *Punishment as Language*, 64 *PHILOSOPHY* 187 (1989). See generally ANDREW VON HIRSCH, *CENSURE AND SANCTIONS* (1993), for an explanation of the “mixed” theory and presenting some of the motivations for non-instrumental expressionism.

<sup>4</sup> See PATRICK DEVLIN, *THE ENFORCEMENT OF MORALS* 1–25 (1965); EMILE DURKHEIM, *THE DIVISION OF LABOUR IN SOCIETY* 11–174 (W. D. Halls trans., MacMillan Publishers 1984); see also Primoratz, *supra* note 3, at 188–91.

<sup>5</sup> See, e.g., SAUL SMILANSKY, *FREE WILL AND ILLUSION* (2000); Galen Strawson, *The Impossibility of Moral Responsibility*, 75 *PHIL. STUD.* 5 (1994).

<sup>6</sup> See VON HIRSCH, *supra* note 3; Feinberg, *supra* note 3.

worry what the point of expressing condemnation can be, according to the non-instrumental view. It might sound as though the non-instrumental view deprives itself of any resources to argue that there is some further good achieved by expressing condemnation. But how, then, can we show the need for condemnation? What is so important about condemnation that makes it an urgent state purpose?<sup>7</sup>

I think that the expressive theory has the resources to answer the concerns raised in the last paragraph and will take that for granted for the purposes of this paper. A concise statement of the right line of response to the third concern is worth quoting:

Rules that state standards of behaviour and command categorically imply that actions violating them are wrong, and that such actions are to be condemned, denounced, repudiated. Expressions of this condemnation and repudiation are the index of the validity of the rules and of the acceptance of the conviction that their breaches are wrong in society. If actions of a certain kind can be done without bringing about such a response from society, this indicates that no rule prohibiting such actions is accepted as a valid and binding standard of behaviour.<sup>8</sup>

What Igor Primoratz rightly relies on here is the thought that even though the value of condemnation is not, on the non-instrumental view, merely the most effective way of producing some independent good, nevertheless it can be given further justification as an essential component of something good, in this case the issuing by the state of categorical rules. In other words, as long as we think that it is the job of the state to set limits to what it is permissible for its citizens to do—as long as we think that the state issues legal obligations to its citizens—then, by implication, we must think that it is necessary for the state to mark violations of the terms that it has set. Where nothing is done to mark a violation as a violation—when there is no denunciation—then no prohibition is in force. Since such marking is a minimally necessary accompaniment of the state's ability to set limits to its citizens' actions, non-instrumental condemnation will be justified as long as the state's role in issuing legal obligations is justified.<sup>9</sup>

So far, so good for the expressive view (at least, if the reader is willing to give me the benefit of the doubt on the other points). However, as I have said, in this paper I want to consider a further source of dissatisfaction that focuses on the issue of political authority and individual rights. The question can be put as follows: by what right does the state deprive its citizens of freedom in order to impose

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<sup>7</sup> The kind of concern raised, for instance, in Jeffrie G. Murphy, *Retributivism, Moral Education, and the Liberal State*, 4 CRIM. JUST. ETHICS 3 (1985).

<sup>8</sup> Primoratz, *supra* note 3, at 196.

<sup>9</sup> See Christopher Bennett, *State Denunciation of Crime*, 3 J. MORAL PHIL. 288 (2006), for further development of this line of argument.

condemnation on them? State condemnation of crime, as it is envisaged by the expressive theory, is not simply articulated verbally or symbolically. It comes about by a punitive intervention into the life of the offender. What gives the state the right to take hold of its citizens and impose condemnation on them when they violate its laws? Now Primoratz might say that this question can be answered by reference to the need for the state to set categorical rules for its citizens. Given that the state properly has such a role, there is good reason to think that it will thereby need to condemn infractions of the rules that it sets. But I am now urging that this answer does not fully address the concern. For someone who values individual autonomy, and who thinks that individuals have a right to decide for themselves where right and wrong lie, might still ask why we should think it the state's role to issue rules that are categorical *in the sense that citizens should be subjected to coercively imposed condemnation for violating them*.

### III. A GAP IN THE EXPRESSIONIST JUSTIFICATION OF STATE PUNISHMENT?

I would like to focus this issue by setting out, in schematic form, an argument for state punishment that the expressive theory might deploy. We will then be able to see what the argument, as stated, leaves undefended. The argument goes as follows. It starts with the observation that a decent society is one that takes seriously certain moral standards: such a society recognises that its members ought not to treat one another in certain ways. The state in a decent society therefore recognises certain standards of behaviour as *binding* on its citizens. It seems plausible that the state in a decent society will therefore recognise the binding nature of those standards by outlawing conduct that violates those standards. From these points about the state's need to regard certain actions as intolerable and unacceptable, we can infer that if those standards are regarded as binding on citizens, then the state must *denounce* violations of those standards—it must mark them as unacceptable by taking some action that marks them as such. The state that takes seriously certain standards of behaviour cannot fail to react when those standards are violated. However, in order for an act of marking a violation to have the status of an act of denunciation, it must be *symbolically adequate* (just as a sentence must be reasonably well-formed or symbolically adequate in order to have any meaning). This point raises a question as to where we are to find adequate symbols for acts of denunciation. The expressivist nature of the theory suggests a solution. Since wrongdoing and condemnation properly arouse the emotions—since emotional engagement is constitutive of taking moral wrongdoing seriously—we should expect to find adequate symbols for the expression of denunciation in the life of the emotions. Having said this, our use of the emotions to express denunciation should not be uncritical. The emotions we should look at are those that we can endorse after reflection: they should be responses to wrongdoing that we can see as important aspects of the good human life. Rather than hatred or repugnance, we might say, the responses to wrongdoing that we should be interested in are guilt and remorse and the third person

reflections of these emotions. However, guilt and remorse dispose their subject to making amends: amends in proportion to what the subject sees as the gravity of her crime. And these considerations taken together lead us to a conclusion about the nature of punishment. A symbolically adequate way of expressing proportionate condemnation for crime is to impose on the offender a certain amount of amends: the amount that she would appropriately have undertaken herself had she been properly sorry for her offence. State punishment therefore communicates, in a symbolically inescapable way, how sorry the offender ought to be for the offence.<sup>10</sup>

This argument starts from a claim about the need, in a decent society, for citizens' interactions with one another to be regulated by moral standards. It concludes that it is essential to society's treating those standards as important that the state should take coercive action against its citizens in order to express condemnation of their violations of those standards. This might be a striking conclusion. However, it is a conclusion that seems to evade one of the major traditional questions of political philosophy, namely, the question of the right of the state to take coercive action against its citizens. Indeed, it might seem to assume that the use of coercion to express condemnation does not *need* special justification. If it does make this assumption, however, it would appear to conflict with the view that individuals have basic and fundamental rights to self-determination and liberty, the significance of which is that interventions that deprive citizens of liberty carry a special burden of justification.<sup>11</sup> It would appear to assume, without argument, that the state has the right to impose coercion on its citizens if doing so is necessary to express condemnation in a symbolically adequate way. It might therefore appear that the expressive theory rests on the view that the state has a *natural* right to intervene in its citizens' lives and that there need be no special justification for its right to set standards for its citizens in such a way that it can coercively censure them for their violations.

As I have said, the question in which I am interested here arises in a particularly forceful way for liberal political theorists for whom a basic value of political society is individual autonomy and who therefore hold that each individual has a fundamental right to decide for herself about right and wrong and to act accordingly.<sup>12</sup> On this sort of view, each citizen—each sane adult with a mind of her own—is her own authority, in the sense that she has the ability and the

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<sup>10</sup> See BENNETT, *supra* note 3, at 144–49, where this argument is developed.

<sup>11</sup> See, e.g., A. JOHN SIMMONS, *MORAL PRINCIPLES AND POLITICAL OBLIGATIONS* (1979).

<sup>12</sup> Although my aim at this stage is simply to frame this concern broadly rather than refer to particular authors, I take it that it is this kind of concern that explains the enduring attraction of the expression of individual sovereignty that is part of Mill's harm principle. See JOHN STUART MILL, *ON LIBERTY* (1859), *reprinted in ON LIBERTY AND OTHER ESSAYS* 1, 13–14 (John Gray ed., 1991). For Mill's influence, see, for instance, Feinberg's assumption that we should be free to act as we wish unless there is a special justification for limiting our liberty in JOEL FEINBERG, *HARM TO OTHERS* (1984). For a more recent development of this sort of intuition, see DOUGLAS HUSAK, *OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW* (2008).

right to make her own decisions about how to act and how to live. She is sovereign over her own actions. The concern I will be dealing with in this paper arises because, if individuals have a basic and fundamental right to liberty, we cannot simply assume that the state has a natural right to impose itself on individuals in order to express symbolically adequate condemnation of their acts.

Let me make it clear that the concern I am raising is not simply about the justification of state coercion as such, but rather about the justification of the coercively imposed *condemnation* that the expressive theory appears to require. Liberals who value autonomy might acknowledge that, when we live in society with others, individual sovereignty cannot be absolute. One person's exercise of autonomy may illegitimately infringe another's. In such cases state intervention might be necessary in order to enforce morally important boundaries.<sup>13</sup> However, it is one thing to think that the state has the authority to *protect* citizens from one another; it is another to say that the state has the authority to intervene in its citizens' lives in order to dictate to citizens about which standards they ought to find important and to impose condemnation on them when they disobey. The latter conception of authority might look overbearing, even preachy. As R.A. Duff puts it, the expressive view rests on the idea that criminal law represents "the community's authoritative view" of what is permissible.<sup>14</sup> But why should we aspire to a form of political society that seeks such an authoritative, centralised view?<sup>15</sup> Why should we give the state authority to formulate such a thing on our behalf? And why give the state authority to impose condemnation on us when we depart from that centralised view?<sup>16</sup>

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<sup>13</sup> See ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* (1974), to compare the argument with the justification of the minimal state.

<sup>14</sup> DUFF, *PUNISHMENT*, *supra* note 3, at 65.

<sup>15</sup> It may occur to some readers that the problem can be solved if we think not just of the state, standing in hierarchical relation to us, but of the people governing themselves. However, while the idea of self-government will indeed be important to my argument later on, there is still an important question about the authority of democracy: by what right would the people set moral standards for one another that they could be condemned for failing to meet?

<sup>16</sup> An interesting question at this point concerns the relation of the state's right to condemn to the right of any moral individual to express their condemnation of wrongdoers when condemnation is due. A proponent of the expressive view might argue that there is not really any problem of the sort I am raising since the state's right to condemn is unproblematically analogous to the individual's. As individuals we have a right to speak our mind to other individuals and let them know what we think of them; it might even be said that a failure to do so would be inauthentic (a failure to take the wrongdoer seriously), particularly when there is some serious wrong at issue. If no serious problems arise about the individual's right to condemn when condemnation is merited, why should there be a problem with the state's condemning? This is a complex issue which partly depends on what condemnation consists in: is it making a judgement (internally, without overtly condemning a person to his face), overtly condemning a person, or "blaming" behaviour that treats the person as a wrongdoer but does not involve verbally condemning him to his face? State condemnation is confrontational face-to-face criticism, and there are moral rules governing when it is one's place to express such condemnation (even when condemnation is due): at least sometimes, saying "I don't have to answer to you for my actions" can be in order even when the acts are not denied to be

## IV. THE NATURE OF LEGITIMATE AUTHORITY

The task for this paper is therefore to determine how problematic the claims about state authority on which the expressive view rests are. First of all, we need to state more precisely the claims about authority to which the expressive view is committed. This will enable us to make the liberal source of dissatisfaction more precise. We should note at this point that our interest is not simply in the proper *extent* of state authority but in its very *nature*. The expressive theory seems to assume something, not simply about the *kinds of things* that the state can forbid or require, but rather about *what the state is doing* when it forbids or requires. The expressive theory takes it that the state can forbid and require in such a way as to legitimate coercively imposed condemnation for disobedience. It assumes that the standards set by the state are authoritative for citizens in the sense that they ought to take them into account in deciding how to act and in the sense that the state will be justified in depriving its citizens of freedom in order to express condemnation of them when they disobey. This raises two sorts of questions: what kind of state authority would have to be legitimate in order for the claims of the expressive theory to be plausible, and which kinds of state authority are *actually* legitimate? In this section I will begin this inquiry by briefly setting out four conceptions of legitimate authority that are commonly distinguished in political philosophy and philosophy of law.<sup>17</sup>

The most minimal conception of legitimate authority is that a body such as a state is legitimate when it would be justified in using coercion against a given group of subjects in order to enforce its ends. When a state claims to be justified in exercising coercion in this sense, then it would naturally appeal to the importance of the ends to be served by the coercion. What marks out this minimal conception of authority is the claim that there is nothing more to legitimate authority than having ends of sufficient importance as to justify coercion. For instance, on this conception of authority, the Nozickian “night-watchman state”<sup>18</sup> would have legitimate authority over its citizens as long as it was justified in its use of coercion

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wrongful. Applying this to the state, there is bound to be an issue about which acts the state can require us to answer to it for. See R.A. DUFF, *ANSWERING FOR CRIME: RESPONSIBILITY AND LIABILITY IN THE CRIMINAL LAW* 43–56 (2007). Furthermore, there are obviously disanalogies between state and individual condemnation. For instance, state condemnation is coercive in the sense that the offender can be required to listen to it and to comply with an associated punishment. And state condemnation is for violations of rules that the state has laid down as authoritative and binding for all citizens. Therefore, a natural idea is that the state has a right to punish in part because it has determined the laws. It is the legitimacy of this type of coercive state condemnation that I am interested in here.

<sup>17</sup> But cf. THOMAS CHRISTIANO, *THE CONSTITUTION OF EQUALITY: DEMOCRATIC AUTHORITY AND ITS LIMITS* 240–43 (2008); LESLIE GREEN, *THE AUTHORITY OF THE STATE* 21–62 (1988); JOSEPH RAZ, *THE MORALITY OF FREEDOM* 23–69 (1986); Scott J. Shapiro, *Authority*, in *THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW* 382 (Jules Coleman & Scott Shapiro eds., 2002).

<sup>18</sup> NOZICK, *supra* note 13, at 26.



to protect one citizen from another. Critics of this minimal conception can argue that matters are not so simple. On the one hand, we should admit that if a party such as a state is justified in imposing its will on its subjects and making them do what it asks them to do, then its standing is certainly better than that of a state that lacks such a justification. (To that degree we might talk of its interventions as being “legitimate” if by that we simply mean justified. And, because the state “presides over” its subjects in some way we can perhaps talk about authority, the state, if it is justified in exercising coercion, is in some way “in charge.”) On the other hand, justified coercion differs from what we might naturally think of as authority because it does not involve the idea that the coercion occurs as an enforcement of directives that those subject to the authority have a duty to obey. The crucial idea of legitimate authority, we might say, is that the state can legitimately “call on” its citizens to act as it says: it is only if that claim to be obeyed can be vindicated that the authority would be legitimate. On the conception of legitimate authority as justified coercion, citizens might be thought to have prudential reasons to obey the state’s directives—that is, in order to avoid coercion. And if the state’s purposes are justified (as they would have to be if they were to justify the use of coercion), citizens might also be thought to have reason not to impede the state in its pursuit of its purposes—not to act against the state in a way that will harm it.<sup>19</sup> But they will not have reason to follow the state’s directives *just because the state has thus directed*. This is why we should think of justified coercion as a minimal, even revisionary conception of legitimate authority.<sup>20</sup>

The crucial idea behind the traditional notion of legitimate authority, then, as distinct from the idea of justified coercion, is that the state can appeal to duties that its citizens have to do what it says. However, in order to get at the heart of the traditional idea of political authority, we have to distinguish it from another related idea of authority. This is the idea of the authority of an expert: what I will call *epistemic* authority. We call experts “authoritative” in that they have a better grasp than non-experts of what reasons there are for acting or believing a certain way. If you want to know how to wire up the electrics in a new house you are building, for instance, then you would be well advised to consult someone who knows what they are talking about—that is, someone who has a good grasp of the reasons for doing it one way rather than another. In this sense the expert rightly has authority over the non-expert: the non-expert would be well advised to pay heed to the expert. Indeed in many cases, as with a qualified electrician, it makes perfect sense to rely on the judgement of the expert and let it supplant one’s own.

Epistemic authority *might* be taken to fit our non-minimal characterisation of political authority above: on this interpretation, the state would be able to “call on”

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<sup>19</sup> For this point, and the contrast with legitimacy proper, see A. John Simmons, *Justification and Legitimacy*, 109 *ETHICS* 739 (1999).

<sup>20</sup> For an account of the justified coercion conception that is along the same lines, see CHRISTIANO, *supra* note 17, at 242.

its citizens to act in determinate ways because it is better than they are at assessing the reasons for acting this way rather than another. If the state were relevantly analogous to the expert (like the electrician, say), then we would have reason to follow its directives as good *advice*. If, for instance, the state were to be an expert with respect to justice in the way that the electrician is an expert with respect to electric, then we would have reason to treat what it says as authoritative. The reason citizens ought to obey the law, on this view, would be that they should let the state's judgement supplant their own in the way that an expert's judgement can properly supplant that of a non-expert.

We will comment on some ethical problems of this conception below. But putting these aside for the moment, epistemic authority is usually taken to be distinct from the traditional conception of political authority on the grounds that the reasons we have for following the directives of epistemic authorities are not, ultimately, that they have directed us to act in that way. What makes experts "authoritative" is that they have a grasp of what reasons there are *anyway*, and their deliverances *reveal* those reasons to those of us who do not have such a good grasp of the issues. Therefore, when we act on the advice of the experts, the considerations that count in favour of our acting are simply the same considerations that count in favour of their making the judgement that that is the thing to do. The judgement of the experts is, we might say, *transparent*: the reasons for our acting—the considerations that ultimately count in favour of these actions—are simply those considerations the significance of which we need the expert to interpret. Crucially, therefore, the reason for doing as the expert says has to do with the *substance* of what they have directed us to do (and why) rather than with the mere fact that they have issued such a directive. However, authority in the traditional sense of legitimate political authority (if there is such a thing) *does* consist in the fact that those subject to the legislating body have reasons to do as that body says simply because it has thus directed. To give a parallel example, the reason the students of a university department have for reading the books their teachers suggest is that (or insofar as) those teachers can be regarded as epistemic authorities. Whereas the reason they have for submitting their essays in a certain format and by a certain date is that their teachers have authority over them in this traditional sense: their teachers have the normative power to determine what they are required to do. A legitimate authority therefore creates duties for those subject to it by virtue of its dictates. If there were such a legitimate authority, the reason citizens would have to follow its directives would be *that it has thus directed*.

This conception of authority has been made precise by Joseph Raz.<sup>21</sup> On Raz's view, a legitimate authority is one that succeeds in giving those subject to it reasons for action. In other words, the directives of the governing body make a difference to the balance of reasons facing each individual subject to its authority. However, these reasons do not simply add weight to one side or another of an internal argument that might go on in a person's deliberation. Rather, the reasons

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<sup>21</sup> See RAZ, *supra* note 17, at 23–62.

are *content-independent* in the sense that their force derives from the fact that they have been issued in a certain way (for instance, through the correctly-formulated deliverances of a legislator), and the reasons are *pre-emptive* in the sense that they give the person reason to leave out of account various considerations that otherwise would have counted in favour of the action. In other words, prior to the utterances of the authority, one might think that there are various reasons in favour of a certain course of action. However, if the authority prohibits that course of action, then if the authority is legitimate and successfully gives one reasons against that course of action, one now has reason not to take these reasons any longer as favouring this course of action. The reasons provided by the authority therefore have the role of *excluding* at least some other reasons from consideration. As Raz puts it, "the fact that an authority requires performance of an action is a reason for its performance which is not to be added to all other relevant reasons when assessing what to do, but should exclude and take the place of some of them."<sup>22</sup> On this view a legitimate authority therefore has the normative power to create reasons for those subject to it, reasons whose force derives from the fact that the proper procedure has been followed and whose function is to give those subject to them reason to set aside various other considerations that might otherwise be taken to favour another course of action.

We have now distinguished three conceptions of legitimate authority: the justifiable use of coercion; the authority of an expert; and the traditional sense of authority as the normative power to issue pre-emptive, content-independent reasons. However, we can interpret this traditional conception of authority in two different ways: this will give us our third and fourth conceptions of legitimate authority. For there are two questions we can ask about authority: one concerns what it is, and the other concerns what it takes to make it legitimate. So far we have distinguished different conceptions of authority by looking at how they differ in their understandings of what authority is. But we can distinguish two ways of thinking about what it takes for an authority, in the traditional sense of political authority, to be legitimate: an instrumental account which takes it that ultimately an authority's directives are binding because of the good it does to follow it and a non-instrumental account on which there is a different justification of its bindingness.

Let us look at the instrumental version first. Raz answers the question of what makes an authority legitimate by reference to the "service conception" of authority and the "normal justification thesis."<sup>23</sup> The service conception of authority holds that the point of an authority is to serve the interests of the governed, specifically by making it more likely that those subject to it will comply with the reasons that apply to them. In other words, an authority is justified on Raz's view if it issues directives and those who follow those directives are more effective at complying with the reasons they had anyway than they would have been had they not

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<sup>22</sup> *Id.* at 46 (emphasis omitted).

<sup>23</sup> *Id.* at 53–57.

followed its directives. The most obvious interpretation of Raz's account of legitimacy is to see it as instrumental: obeying the authority (or, treating its directives as binding) is justified as a means to some further end. However, one concern about such an account is whether it would explain how the directives of an authority succeed in binding those subject to the authority. It seems as though the legitimacy of such an authority might be a piecemeal affair, depending on whether, in a certain domain of conduct, following the authority would make it more likely that someone will comply with the reasons that apply to them.<sup>24</sup> Furthermore, as Thomas Christiano points out, although such an authority has the normative power to create reasons for its subjects, any obligation that there is for subjects to follow those directives is not owed *to* the authority.<sup>25</sup> In failing to comply, subjects would not be defying the authority; rather they would be letting themselves down by making it more likely that they would fail to comply with the reasons that apply to them, or letting down those whose interests ground those ultimate reasons that apply to them.

Although Raz has given us a helpful account of the nature of authority, it would appear that the normal justification thesis is not the central account of what makes such an authority legitimate. Presumably, the most basic idea of a legitimate authority is that of a governing body whose subjects have a duty to obey it by virtue of its *position* rather than because of the piecemeal helpfulness of following its dictates. Therefore, there is space for a further non-instrumental conception of authority, which Christiano terms *inherent* authority.<sup>26</sup> Inherent authority is the right to rule. When an authority has the right to rule, its subjects have reason to obey, not because doing so is instrumentally valuable but because it is the authority's *place* to determine how those subject to it are to act. For instance, students have reason to comply with the deadlines set by their university because the university has the right to determine what its students will be required to do.

In order to show that an authority is inherently legitimate, its claim to a right to rule would somehow have to be vindicated. Naturally, this is the most demanding and most problematic conception of authority to have to establish. Although the right to rule is arguably what we intuitively mean when we talk about political authority, the difficulty of establishing how inherent authority might be achieved is what accounts for the popularity of revisionary and instrumental conceptions of authority. One important source of resistance to the idea of inherent authority lies with the idea that sane, adult human beings are autonomous or self-governing. If citizens have a right to govern themselves, how can the state have a right to govern them? Therefore, one might argue for a logical

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<sup>24</sup> See *id.* at 74, where Raz notes this feature of his position (and claims it as a strength rather than a weakness).

<sup>25</sup> See CHRISTIANO, *supra* note 17, at 242–43.

<sup>26</sup> *Id.* at 241.

incompatibility between autonomy and authority.<sup>27</sup> Alternatively one might simply think that although a successful account of authority is not inconceivable, each of the extant attempts to establish the right of the state to rule its autonomous citizens has failed.<sup>28</sup> If such scepticism is well-founded, then theorists will of course turn to other ways of explaining what reason citizens might have for obeying the directives of the state. With this problem on the table, we are now ready to return to the expressive theory of punishment. Which of the conceptions of state authority is it that the expressive theory in its non-instrumental version is committed to?

#### V. DOES THE EXPRESSIVE THEORY REST ON A PROBLEMATIC CONCEPTION OF STATE AUTHORITY?

Our questions are as follows: what kind of state authority is implied by the expressive theory of punishment, and is it plausible that the state has such authority? To turn to the first question, it seems straightforward that in order to have the right to condemn its citizens, a state would have to make good *either* on a claim to epistemic authority *or* a claim to what I have called the traditional conception of political authority (or, indeed, possibly both—as we will see further below). State denunciation of crime implies a right, not simply to coerce, but to pass judgement: it assumes that the state is an authority with regard to the reasons that the citizen ought to have taken into account in acting. It looks as though that assumption can only be vindicated if the state is either an epistemic authority or an authority the directives of which create duties for those to whom they are addressed. The question now is whether this is problematic.

First, consider whether we ought to accept the claim that the state is an epistemic authority, and whether, if it were, we should accept that it has the right to condemn us when we do not do as it says. There are a number of problems with this idea. First of all, it might seem implausible to view the state as a repository of wisdom in moral matters. Even if there are experts about how to live, would we put the state in that category? Secondly, as we saw in the last section, the claim to be an epistemic authority is not sufficient for the political authority that is normally thought to be claimed by states. Epistemic authorities only advise: they do not issue binding directives. Could the assumption that state authority lies in the normative power to issue binding directives be mistaken? Could the state simply be thought to advise its citizens when it issues laws? In particular, given our concern here, would the state whose laws were issued as advice have the right to condemn its citizens in the event that they failed to follow its advice? The answer to this last question seems to be no. After all, the proponents of the expressive theory cannot deny that state condemnation of crime is coercive. It involves

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<sup>27</sup> This is the problem famously discussed in ROBERT PAUL WOLFF, *IN DEFENSE OF ANARCHISM* 18–19 (1970).

<sup>28</sup> See SIMMONS, *supra* note 11.

plucking the citizen out of the ordinary course of his life in order to impose a sanction on him. And someone who has the right of an expert to advise is not normally thought of as having the right to respond in *that* way when the advice is ignored. The right to respond with punishment is thought to be reserved to those who have the right to determine what is permissible—that is, those who have political authority in the traditional sense.

Now there *is* an argument that would bridge the gap between epistemic authority and the right to punish. This would be an argument to the effect that a party that has wisdom about how to live *thereby* has the right to dictate to others how to live and punish them if they disobey. Perhaps, for instance, in a particularly meritocratic society, Solomon becomes ruler by virtue of his wisdom in the matters of justice. Nevertheless, even if his wisdom is the reason for his becoming the ruler, his being the ruler consists in more than simply his being wise. Being ruler involves the right to decide upon and issue directives that subjects have reason to take seriously by virtue of the fact that he has issued them. A failure to take these directives into account is not simply a failure to have taken advice. Rather, a failure to follow these directives *wrongs* Solomon because it violates his right to rule. However, this argument that the wise have a natural right to rule opens up a further problem: even if we had a reliable method of determining who the wise are, many believe that sane adult human beings should be regarded as autonomous and as having a right to live by their own lights. A state, however wise, that coerced its citizens into obeying its dictates about how to live might be regarded as paternalistic. If there is a value to autonomy, then it is a right to make one's own mistakes and to be treated as someone able to direct her own life. Therefore, it might seem implausible to claim that, even if the state were an epistemic authority in matters of how to live, it would, just by virtue of its epistemic authority, have the right coercively to condemn us when we do not do as it says.

How, then, do things stand with the expressive theory? From the discussion so far, it seems that the expressive theory must take it that the state has authority in the traditional sense, namely, that when it issues directives it thereby creates binding (pre-emptive, content-independent) reasons for its citizens. By virtue of having such authority, it has the right to impose condemnation on its citizens when they disobey. As we have seen, proponents of the expressive theory *might* argue that the state gains such authority by virtue of its wisdom in moral matters, though they will then face various problems. However, if they reject what we might call the Solomon model of the justification of authority (that is, political authority justified by expertise), what are the alternatives? It seems unlikely that Razian instrumental authority will be a very good fit with the expressive theory. On the Razian view, the reasons one has for complying with authoritative directives is not that those directives are themselves ultimate reasons, but rather that they are a means to an end. Presumably, on Raz's view the criminal law is to be thought of similarly as helping us to comply with the moral reasons that apply to us. However, if that is correct, then it is not obvious that each time we violate the

criminal law we will thereby merit condemnation. Whether we do or not will depend on whether in that instance we would have complied more adequately with the relevant moral reasons by obeying the law. However, presumably the proponents of the expressive theory wish to argue for the view that it is violations of the law that merit condemnation and not violations of the criminal law that are also violations of independent moral reasons. If the expressive theory took the latter position, it would deprive the state of the right to punish whenever a citizen would have been less likely to comply with relevant moral reasons by obeying the law. In order to avoid that problem of a piecemeal right to punish, proponents of the expressive theory will be pushed towards defending the idea that the state, and in particular its criminal law, has inherent authority over its citizens.

For this reason it might seem that the model of Solomon is the account of state authority that fits best with the expressive view. Solomon, we are imagining, is wise in matters of justice and for that reason is given the right to rule over his subjects. Solomon would therefore be well placed to issue condemnation of his subjects when they fail to follow his directives. Indeed, further evidence can be brought for this interpretation. The expressive theory requires not just that there be *some* way of grounding the inherent authority of the state, but rather that the grounding that is given be such as to make sense of the idea that citizens will deserve condemnation and punishment for violating the criminal law. The expressive theory is generally taken as an attempt to defend punishment as moral condemnation of crime. For instance, Joel Feinberg argues that what makes punishment different from a penalty or a tax on unwanted behaviour is precisely the element of stigmatising or moral disapprobation that goes with punishment.<sup>29</sup> The promise of the expressive theory is therefore that it will allow us to do justice to the *wrongness* of those acts we label as crimes; that murder, rape, assault, theft, fraud, etc. will be condemned for the reasons that make those acts wrong. However, it might look as though not every possible justification of the inherent authority of the state will deliver a right to express full moral condemnation. For instance, say there turns out to be a successful way of grounding the inherent authority of the state, but the successful view is a contract or consent theory that sees citizens as having undertaken something like a promise to obey. Now if the state condemns violations of its laws, then it should condemn an offender's failure to do what she owes it to the state to do. The state can only comment on those aspects of its citizens' lives that are its proper business. If the basis of the citizens' obligations to the state is something like a promise, then it would appear that its condemnatory message should be something like: "you have broken your promise." It is, presumably, violations of those promissory obligations that the state has the right to condemn. But, in that case, such an account of political obligation will not deliver the right to issue full-deserved moral condemnation of crime that the proponents of the expressive theory are after. Murder will be condemned by the state not as the unjustified destruction of an innocent human

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<sup>29</sup> See Feinberg, *supra* note 3, at 401–04.

life, but rather as a failure to abide by the terms of the contract. This is not the full-blooded moral condemnation that the expressive theorist wants. Therefore, the problem for the expressive theorist is that she must hope not just for a justification of inherent authority, but for a justification that explains how the state has the right coercively to impose condemnation for (what it sees as—given that it might be mistaken) the wrongness of violating the criminal law.

The Solomon model of state authority, however, solves this problem. The Solomon model allows Solomon to condemn offenders precisely for the wrongness of what they have done. We can see this as follows: By virtue of his wisdom, we have supposed, Solomon has the right to issue binding directives. Thus, he decides how to direct his subjects on the basis of what, if we take him to be genuinely wise, are good or at least relevant reasons. The reasons he would have for censuring failures to follow his directives would thus be twofold. In part his reasons for censure would be that those actions wronged him by violating his right to rule, and in part his reason would be that there are good independent moral reasons not to act in that way, reasons that informed his decision to prohibit that activity. Therefore, on the Solomon model, the state would have the right to condemn offenders not just because they had broken a promise, or because they had attempted to take an unfair advantage over their fellow citizens, but because their acts were really wrong. Once again it might look as though the expressive theory is pushed to favour the Solomon model, despite its problems.

After the extended discussion of the last two sections, we are now in a position to re-formulate the liberal concern about the expressive theory's assumptions about the authority of the state. Let us first of all summarise what we have argued about the view of state authority assumed by the expressive theory. The expressive theory requires that the state have authority that is more substantial than that offered by the justified coercion conception. It requires that the state be authoritative in some sense about what reasons citizens have. On the one hand, this might be because the state is an epistemic authority, and epistemic authorities have the right coercively to condemn those who fail to take their advice. On the other hand, it might be because the state has the normative power to issue binding directives to its citizens in such a way that it also has the authority to condemn certain types of wrongdoing. I have argued that, in order to establish that the state has the right to condemn, the expressive theory must take it that the state has the right to rule and that offenders therefore wrong it when they violate its directives. This raises the question of how the state gains the right to rule. In suggesting a possible answer to this question, we looked at the further consideration that, for the expressive theory, the state's right to rule must give it the right to condemn offenders for the wrongness of their acts and not merely for a violation of the particular obligation that the offender has to the state. The model of authority that—so far, at least—seems best to fit these various desiderata is the Solomon model. Solomon has inherent authority, that is, the right to rule, but has this right on the basis of epistemic authority. The Solomon model, as we discussed it, involves the



assumption that those who have epistemic authority about the nature of justice thereby have not just instrumental but inherent authority.

The liberal criticism involves doubting the justifiability of the right to rule, and in particular the appropriateness of the Solomon model, that appears to be assumed by the expressive view. First of all, there is a problem of showing how the right to rule is compatible with individual autonomy. This problem is particularly pressing for the expressive view because it requires an account of the right to rule that will deliver a right to condemn for the moral wrongness of violations of criminal law. It is in response to this latter problem that we suggested the Solomon model of state authority, though it is unclear, to say the least, how this might be compatible with due recognition of individual autonomy. The adoption of the Solomon model, however, leads on to a second problem, namely, that of epistemic authority. Should we regard the state as an authority on the matter of how we ought to live together? Should we regard the state as in a position to know what moral standards ought to regulate our interactions better than we know it ourselves? Thirdly, even if there is an epistemic authority on such matters, and it happens to be the state, there is a problem of whose right it is to set the terms of how we ought to behave towards one another. A liberal who prizes individual autonomy might argue that possession of epistemic authority does not by itself give anyone the right to rule. Each individual has a right to live according to his or her own lights, it might be said, a right that is not simply cancelled by the fact that one party's light may be more perceptive than another's. Of course, that right to self-determination can be given up voluntarily, as when we contract with another party. Furthermore, the importance of protecting and enforcing individual rights to self-determination means that it is necessary in many cases for the state to intervene coercively in the lives of its citizens and that this will be justified insofar as it is done to protect individual autonomy. Citizens, on such a view, may also have some duty to support the state and not to hinder its pursuit of its justified ends. However, if the suspicions we have been considering about the Solomon model of authority are justified, citizens will have no grounds to treat its dictates as authoritative reasons. It would follow that the state should not be thought of as having a role in condemning citizens because it does not have a role in dictating to them how they ought to act. It does not set authoritative categorical standards in the way Primoratz assumes.

## VI. DUFF ON THE AUTHORITY OF THE CRIMINAL LAW

What I have done in the first sections of this paper is to set up a problem facing the expressive theory of punishment and to fill it out as far as possible. However, being a proponent of the expressive theory, I do not intend to leave matters there. Having set up the problem, I now want to look at the resources the expressive theory has to respond to it. To do this I will concentrate in the first instance on the position of R.A. Duff, who arguably has the most developed version of the expressive theory in this area. Our initial line of inquiry will be to

establish whether Duff's version of the expressive theory is committed to some version of the Solomon model of state authority. Duff argues that crime is a "public wrong" in the sense that it is a wrongful action in the condemnation of which the public, and by extension the state, has a legitimate interest.<sup>30</sup> Certain assumptions about authority are implicit in this claim. For instance, there is the assumption that the public has the right to make certain wrongs its business in the sense that it has the right to seize hold of the offender in order to express its condemnation. And there is the assumption that the state has the right to decide which wrongs it is that the public has a legitimate interest in, and which acts that wrong consists in. According to the Solomon model, Solomon has these rights by virtue of his wisdom. Does Duff have to say something similar? To start with, let us have a look at the broad outlines of Duff's views on the authority of the state and its criminal law.

#### *A. Duff Against the Justified Coercion Conception of Legitimate Authority*

First of all, it is clear that Duff is committed to a more substantive view of legitimate authority than that offered by the justified coercion model. In his discussion of the authority of law in *Trials and Punishments*, he argues that the legitimate state does not merely exercise (justified) power over its citizens. Rather, it issues legal obligations that citizens have reason to obey: "Obligation-claims, both legal and non-legal, are addressed to rational agents, and seek their assent as well as their obedience: this is part of the logic of such claims."<sup>31</sup> Coercion such as state punishment must be justified by reference to some failure to comply with those obligations.<sup>32</sup> Therefore, the legitimate state does not merely impose coercion on its citizens; rather it has something to say to them about why that coercion is justified. Furthermore, and this is fundamental to his account, what it has to say to its citizens in justification of their punishment has to do with the existence of obligations that the citizens had not to act as they did, obligations the force of which citizens can recognise through the conscientious exercise of their own understanding.<sup>33</sup> This requirement that punishment be justified to citizens by reference to their violation of standards that they could have seen to be authoritative lies behind Duff's rejection of consequentialist approaches to justifying punishment. Consequentialist punishments would be manipulative in the sense that they aim to make an individual behave a certain way by creating new, merely prudential reasons for action rather than appealing to the force of pre-existing requirements. The requirements of the political community—the standards the flouting of which risk bringing down the coercive power of the

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<sup>30</sup> DUFF, PUNISHMENT, *supra* note 3, at 60–63; *see also* DUFF, *supra* note 16, at 51–52.

<sup>31</sup> DUFF, TRIALS, *supra* note 3, at 82.

<sup>32</sup> *See id.* at 151 ("Punishment . . . must logically be imposed on an offender, for an offence . . .").

<sup>33</sup> *See* DUFF, PUNISHMENT, *supra* note 3, at 56–58.

state—must have a basis that, as citizens, we can understand and affirm. The principles according to which the state directs us must be such that we can recognise them for ourselves as authoritative.

Nevertheless, this claim about the inadequacy of mere coercion, however justified, seems only to provide us with a necessary condition of legitimate authority. Duff may be right that an authority can only be legitimate when its power is exercised over its citizens by reference to standards that they can accept. But does it follow that all exercises of power that can be justified to those against whom they are exercised are thereby legitimate? Or is it the case that we must also establish (as the conception of inherent authority holds) that those against whom the power is exercised had an obligation *to* the authority to abide by those standards? It would appear that we need to establish the latter if we want to be able to say that the state has an exclusive right to punish.<sup>34</sup> If we can establish that we have an obligation to the state to abide by certain moral standards, then it will follow that it is in part the state that we wrong when we violate those standards and hence the state that has a right to take action against us as a result. Assuming that Duff shares this aim, what does he have to say about the basis of our obligation to the state to abide by the relevant standards?

#### *B. Duff Against the Criminal Law as a Set of Content-Independent Directives*

Let us begin by looking at how Duff interprets the claim that the exercise of state power must be justified by reference to standards that citizens can recognise as authoritative. Two interpretations present themselves. First of all, he might mean that, with respect to the criminal law, there should be substantial reasons, accessible to citizens, for regarding the criminalised act as a wrong: crimes must be wrongs that citizens can see to be wrongs.<sup>35</sup> On this interpretation he would be arguing that the state cannot legitimately punish for wrongs that cannot be justified to citizens as wrongs. It would follow from this interpretation that if the state were to punish, it would have to be an epistemic authority regarding what is wrong. Secondly, however, he might rather be interpreted as arguing that state intervention must be justified to citizens as stemming from an authority that, by their own lights, they could see that they have a duty to obey. On this latter interpretation,

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<sup>34</sup> Although there are many cases in which a punishing authority has a right to punish someone for a failure of duty to a third party (as when the state punishes *X* for reckless disregard of his duty to take due care of the life of *Y*, a duty *X* owes primarily to *Y*), the claim is that it seems to be necessary, for the state to have a right to punish *X*, that *X* in part should owe it also to the state to take due care of the life of *Y*.

<sup>35</sup> This will apply at any rate to *mala in se*—that is, to wrongs that are wrong independently of the circumstances of political community. It might be thought that it will not apply to *mala prohibita*—that is, to wrongs that are such as a result of having been prohibited by the state. However, as Duff points out, many *mala prohibita* are in fact extensions of *mala in se* to the circumstances of political life—a speed limit is an attempt to do justice to the independent wrongness of endangering life, for instance—or an attempt to make *mala in se* more determinate. See DUFF, PUNISHMENT, *supra* note 3, at 64–66; see also DUFF, *supra* note 16, at 92–93.

the way to understand his rejection of a merely coercive relation between state and citizen, however justified such coercion might be, is to see him as calling instead for a relation on which citizens can see themselves as having a duty of allegiance to the state. In other words, he might be arguing that the criminal law must concern itself with acts that are independently wrongs, or he could be taken as arguing that the criminal law must be addressed to citizens by a body that they can see has a justified right to rule over them. Both of these would involve the state addressing reasons to its citizens, reasons that would justify its intervention and which they can see by their own lights would justify that intervention.<sup>36</sup>

On the face of it, it looks as though the answer to this question is emphatically that Duff intends the first interpretation and not the second. For a start, his claim that the criminal law should be a “common law” involves the thought that the criminal law should embody values and principles that citizens can recognise as their own—that is, they can recognise by their own lights that they are morally bound by the standards that the criminal law appeals to.<sup>37</sup> However, secondly, if Duff were making a point about the need for citizens to recognise the authority of the state to make a criminal law, and thereby set limits to their actions, then he would endorse the idea that the state issues binding, content-independent directives and that it is in these that the criminal law consists. If his point were that intervention can be justified to the populace if it stems from a body that the populace can recognise as possessing the right to rule, then, since the normative power to issue binding, content-independent directives is what the right to rule consists in, he would frame his argument in those terms. Instead, however, Duff argues that the criminal law ought not to be thought of as giving citizens content-independent reasons.<sup>38</sup>

Duff’s attack on content-independence is rooted in the concerns we looked at in Part VI.A: that state power must not be simply wielded manipulatively over citizens but rather must be deployed on the basis of values that are their own values. Duff’s concern is that it flies in the face of respect for citizens as agents capable of moral understanding if the directives of the state are to be taken as

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<sup>36</sup> I have said that there are two ways of interpreting what Duff means. However, there is a third possibility, which is that Duff could be committed to both of these points. That is, he could be committed to the claim that the criminal law consists in binding directives issued by a governing body that citizens can recognise as having the right to rule, and which is also an epistemic authority in the sense that its directives are addressed to citizens as correct judgements about the balance of independently valid reasons. I believe that this interpretation, which ascribes to Duff something like the Solomon model of state authority that we discussed above, may be more charitable than either of the two just outlined. However, for reasons that we will discuss directly, there are elements of Duff’s account that suggest that he rejects the right to rule as traditionally conceived, and so it will be useful initially to stick with the two options just outlined.

<sup>37</sup> See DUFF, *PUNISHMENT*, *supra* note 3, at 59–60.

<sup>38</sup> Though in a footnote to *Punishment, Communication, and Community*, Duff points to Raz’s account as the best discussion of the topic of the authority of law in general (noting, however, that he regards the criminal law as a special case). *Id.* at 210 n.39.

obligations regardless of their content.<sup>39</sup> The idea of content-independence seems to suggest to Duff the following possibility: that if the state possesses authority in the way that Raz suggests, members of the state must see the state's directives as giving them reason to act in a given way regardless of any other supporting reasons; the fact that the reason is content-independent means that the chain of reasoning supporting this reason gives out at the point at which it reaches the fact that the state has said that they are to act thus (and that in doing so the state followed the appropriate procedure). Duff is concerned to argue that this is insufficient justification for any claim to legal validity. The purported obligation must be seen as addressing moral reasons to its recipients and thus as engaging with their identity as rational agents who can assess what they ought to do in the light of a morally-informed understanding. A content-independent conception of authority would have citizens obeying the state *simply because it is the state* and not, as they ought, because its directives embody their deepest values. This would allow the state to prohibit actions arbitrarily and would also mean that citizens' reasons for complying would be *that it has been prohibited* rather than *that it is wrong*.<sup>40</sup>

### C. Duff on Crime as "Public Wrong"

Hence, Duff seems to suggest that neither the justified coercion conception of authority nor the traditional view of political authority as the right to issue binding, content-independent directives, is compatible with the conception of political community at the heart of his version of the expressive theory. What, then, is it that gives the state the authority to punish, on Duff's view?

Thus far we have followed what I take to be the standard assumption in legal and political philosophy that, if the state has a right to punish that is more than the right merely to coerce, then it must have the right to issue binding, content-independent directives. In the way that an academic department has the right to set terms for its students, and therefore has the right to take disciplinary measures when those terms are violated, this traditional model of authority assumes that, in order for the state to have a right to intervene in its citizens' lives, it would have to have the right to set the terms for citizens' interactions. Furthermore, we have seen that the justification of this conception of authority, and in particular its reconciliation with due respect for individual autonomy, is problematic. Therefore, if Duff did not need to appeal to this conception, it might be a significant advantage of his account. If he had established a new way to think

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<sup>39</sup> Compare, for instance, Duff's claim that such an understanding of the nature and authority of the criminal law would fail to address citizens "as members of the normative political community whose law this is." DUFF, PUNISHMENT, *supra* note 3, at 58.

<sup>40</sup> See *id.* at 57 ("Few, if any, will obey [the criminal law] out of *respect* for the law's authority: for what kind of person would it be who, though not motivated to refrain from murder or rape by the prelegal wrongfulness of such conduct, was motivated thus to refrain by his respect for the law?").

about the authority of the criminal law, then that would be a highly significant result. As our discussion progresses, however, I will suggest that the most charitable interpretation of Duff's position would *not* see him claiming that the state has no need of a right to rule as traditionally conceived. But in order to see what favours that interpretation, we need to see first of all why the alternative interpretation—that sees Duff abandoning the need for the right to rule—is untenable.

If we take his remarks about content-independence at face value, Duff seems to be concerned to put in place a significantly different conception of authority to those we have looked at so far. The roots of this conception are as follows. Duff is concerned to take seriously the idea that the right to punish, according to the expressive theory, is a right to comment on, to pass judgement on, the conduct of other persons. This is the view expressed in his claim that crime is a “public wrong”—a wrong that the public as a whole, through the actions of the state, have the right to be concerned with, in other words to condemn. If we take this view, then we might think that the question of the authority of the state to punish is settled as long as we can explain how the state, or rather the public whom the state represents, gains the right to pass judgement. The question is then whether the right to pass judgement requires the apparatus of the traditional conception of political authority, specifically the normative power to issue binding, content-independent reasons? The answer is that it might do, but it need not. One way in which one gains the right to pass judgement on the conduct of others is indeed when one has the right to set the terms of their interaction. That gives one a legitimate interest in their conduct. However, that is not the only way one gains such a legitimate interest. Another way is when one is engaged in a common project with those others. When one is engaged in a common project with others, one can call on others to play their part in that project. One has a legitimate interest in the actions of others in so far as they relate to the demands that can legitimately be made on others by virtue of their engagement in that common project. Furthermore, it is important to note that when one has such a legitimate interest, one has it not simply as an individual member of the group. Rather, it is the body engaged in the project as a whole that has this legitimate interest in the conduct of each individual as it bears on the demands that can legitimately be made by virtue of their membership of the group.<sup>41</sup>

Duff's conclusion is therefore that the group as a whole has authority over the individual in the sense that it has the right to pass judgement on his conduct insofar as it has to do with his compliance with the terms of the common project in which they are engaged.<sup>42</sup> It has that right by virtue of what a common project is. Because it is something they are engaged in together, the group's realising of its purposes is as it were common property, and therefore each is responsible to the

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<sup>41</sup> See generally MARGARET GILBERT, *A THEORY OF POLITICAL OBLIGATION: MEMBERSHIP, COMMITMENT, AND THE BONDS OF SOCIETY* (2006).

<sup>42</sup> See DUFF, *TRIALS*, *supra* note 3, at 88–92.

others for his conduct in contributing to those common purposes. What we have in Duff's account is therefore a relativisation of "public interest" to the wrongs one commits qua member of some common project. One important role that this move has is to allow Duff to depart from the Legal Moralist position according to which all wrongs are public business and should be censured or punished, whilst retaining the idea that it is as moral wrongs that the state condemns crimes. On Duff's view, some wrongs may be private: perhaps acts like adultery or deceiving one's friends and family are genuine wrongs and may rightly be censured by the parties involved, but it is not an appropriate concern of the public as a whole (or the state) so to censure them. Nevertheless, there is a category of public wrong that consists in those wrongs that are sufficiently related to the common project that citizens—via the state—have the right to pass judgement on them.<sup>43</sup>

## VII. CONTENT-INDEPENDENT REASONS AND THE RIGHT TO RULE

Again, however, although we might agree that, with the category of public wrong, Duff has pointed out an important necessary condition of the authority of the criminal law, we might wonder whether it is a sufficient condition. That is, we might wonder whether, when an act is a wrong that, by virtue of its perpetrator's involvement in a relevant common project, a group has the right to make its business, it *thereby* has authority in the problematic sense we have been discussing in this paper. In other words, does it thereby have the right to intervene in the life of the free citizen in order to express that condemnation by coercively imposing amends, and does it have the right to formulate an authoritative account of what each wrong consists in, to which citizens will then be held? The answer to these questions seems to be no, on the following grounds. There are many groups directed towards some common project, and whose members have a right to pass judgement regarding each member's involvement in or commitment to the project, but where no authority of the type in which we are interested is given to any central governing body.<sup>44</sup>

Duff's account of crime as public wrong therefore appears to need to be supplemented with an account that will explain why the state has the right to rule in the sense we have been inquiring into. In order to back up the claim that one's fellow citizens have a right to coercively express their condemnation when an offender fails to meet the basic standards of the common project, one would have to establish not merely that they have the right to pass judgement on that offender, but that they have the right to rule. Or rather, one would have to establish that citizens can, and perhaps should, set up a central governing body that will have the right to rule in the sense that it has the authority to set binding standards for its members, standards violation of which will legitimate the state in depriving the offender of freedom in order to express condemnation. That is, it would have to be

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<sup>43</sup> See DUFF, PUNISHMENT, *supra* note 3, at 60–63.

<sup>44</sup> See GILBERT, *supra* note 41, for fertile examples of such involvement in groups.

established that membership of the common project followed by the polity gives that governing body a say in how one acts: membership of the common project involves giving it a right to hold one to the standards that structure your shared activity. Duff appears to reject this traditional conception of the right to rule since he rejects the idea that law consists in content-independent reasons.<sup>45</sup> However, I will now argue that Duff is wrong to reject the conception of the state, and its criminal law, as binding its citizens by virtue of content-independent reasons.

I think that the best understanding of Duff's account is to say that he must accept that the state has the right to rule but that its authority does not extend to its prohibiting actions *regardless* of their independent moral status. Rather, because of the importance of engaging the understanding of the citizen, it is essential that the state's requirements be addressed to citizens in terms that they can grasp. As with the Solomon model, Duff requires a governing body that has the right to rule but does so on the basis of insight into relevant reasons. Does not that mean that the reasons such a state gives its citizens through its directives are not content-independent? It certainly means that the force of the directives is defeasible rather than absolute. But the notion of content-independence, as I understand it, is still relevant because it is simply meant to draw attention to the special way in which laws issued by a legitimate authority are binding. Let us briefly illustrate this point.

In his discussion of moral and legal obligation, H.L.A. Hart points to promising as a form of obligation that shares with legal obligation the feature of content-independence: "[In promising] the obligation springs not from the nature of the promised action but from the use of the procedure by the appropriate person in the appropriate circumstances."<sup>46</sup> In other words, if I have promised to help Matthew bring in his harvest, then my reason for helping him to bring in his harvest (and the reason I am under an obligation to do so) is that I have promised to do so. We do not need to search for further content to back this obligation up or any further good consequence that will arise from doing so. We could give such an account, of course, pointing to reasons of benevolence, or reasons of reputation, or reasons of reciprocity. But notoriously these reasons do not capture the binding character of the promise. For if they did then, in situations in which these reasons do not obtain, the promise would not be binding. Since it appears that promises can be binding independently of such reasons, the binding character of the promise must therefore be seen as coming from the backward-looking, content-independent reason that you followed the appropriate promising procedure (in appropriate conditions).

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<sup>45</sup> Compare DUFF, *PUNISHMENT*, *supra* note 3, at 57, where he claims that the content-independent conception of law as prohibition is "not how we should understand the criminal law of a liberal polity."

<sup>46</sup> H.L.A. Hart, *Legal and Moral Obligation*, in *ESSAYS IN MORAL PHILOSOPHY* 82, 102 (A.I. Melden ed., 1958).



Of course, we should make an important point here, which is that in some situations well-made promises are not binding. Thus, perhaps a promise to kill one's child could never be binding—at least not without some background story about how killing her in that situation would be to do her some good rather than a grievous wrong. However, this does not show that what makes promises binding is the good that they do rather than the backward-looking reasons we have mentioned. Rather, it shows that the backward-looking reasons are defeasible. In the end, they are *pro tanto* reasons and can be overridden by other considerations.

What is going on that makes the promise binding? We can refer to Hart's own account:

By promising to do or not to do something, we voluntarily incur obligations and create or confer rights on those to whom we promise; we alter the existing moral independence of the parties' freedom of choice in relation to some action and create a new moral relationship between them, so that it becomes morally legitimate for the person to whom the promise is given to determine how the promisor shall act. The promisee has a temporary authority or sovereignty in relation to some specific matter over the other's will which we express by saying that the promisor is under an obligation *to* the promisee to do what he has promised.<sup>47</sup>

In other words, promising involves a voluntary, partial, and temporary transfer of authority from one party to another. One transfers one's freedom to decide what one will do to another party, giving that party the right to decide whether one will be called upon to perform the promised action. The sovereignty that underpins this freedom is partially and temporarily handed over.

As I understand it, the appeal to content-independence in discussions of the authority of the state makes the same basic point. What is meant by saying that the state's right to rule, if it possesses one, is a normative power to issue binding, content-independent reasons, is that the force of its directives is not merely instrumental but rather has to do with *whose place it is* to decide how citizens are to act (at least with respect to certain areas of conduct). It is also to say that the state's having a say in how we behave is not automatically waived if the directives it issues are misguided. At some point, of course, if what the governing body requires us to do is seriously wrong, then we ought to draw the line and reject the authority of its demands. But if there is such a thing as legitimate authority, then this point is reached only gradually. The reasons we have for complying with its demands, just like the reasons we have for complying with promises, are *sui generis* and have to do with whose right it is to decide what we will do. If the state

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<sup>47</sup> H.L.A. Hart, *Are There Any Natural Rights?*, in *POLITICAL PHILOSOPHY* 53, 60 (Anthony Quinton ed., 1967); see also David Owens, *A Simple Theory of Promising*, 115 *PHIL. REV.* 51, 71 (2006) ("In promising you a lift, I grant you the authority to require me to give you a lift: it is now up to you whether I must give you a lift home.").

has a right to decide how we will act, then this right does not disappear when it asks us to do something we had no prior reason to do. This is simply meant to illustrate that as long as one can swallow the idea that the state has a right to rule, content-independent reasons are not as morally suspect as Duff appears to claim. If Duff does not mean to reject the idea that the state has a right to rule, then he has no need to reject the idea that its laws—even the criminal law—are content-independent directives.

#### VIII. SOME FURTHER DESIDERATA FOR THE EXPRESSIVE THEORY

One might think that we have been uncharitable in interpreting Duff's rejection of content-independent reasons as a rejection of the traditional account of authority as the right to rule. Perhaps Duff does indeed recognise the need for the state to possess a right to rule. After all, if Duff were to insist that the state must condemn with relevant reasons, then there would appear to be no right to condemn for violation of a mistaken law. It is one of the theoretical advantages of the idea of inherent authority that its directives are binding even when wrong. Therefore, what Duff needs to claim is that, like Solomon, the state must condemn on the basis of its best conception of relevant reasons, but that it is its place to set limits for its citizens on the basis of its best conception of the reasons that apply to them as members of the polity, on the grounds that the state has the right to rule. And it would appear that Duff agrees that the state has the right to make decisions on matters of the morality of the criminal law that citizens are meant to treat as authoritative regardless of whether they agree with them:

In relation to *mala in se*, the law will sometimes have to provide precise *determinationes* of values whose precise prelegal meanings or implications are uncertain or controversial. The law defines just what counts as murder or theft or rape, as well as what counts as a justification for what would otherwise be a criminal action. In doing so, it specifies more determinate legal meanings for normative concepts whose prelegal meanings are typically less determinate, and it takes an authoritative stand on issues that may be controversial in the political community, such as the permissibility of euthanasia.<sup>48</sup>

In which case, we might interpret Duff not as rejecting the right to rule altogether, but rather as insisting that the state will have the right to rule only when, like Solomon, it aspires to, and is reasonably successful in, basing its directives on reasons that apply to citizens anyway. Nevertheless, even if we do interpret Duff in this way, we still need an answer to the question of what the basis of the state's right to rule is that will give it the right to coercively express condemnation for its view of public wrongs. Does Duff have to accept the

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<sup>48</sup> DUFF, PUNISHMENT, *supra* note 3, at 64.

Solomon model? One alternative that we have looked at is Raz's view, but we rejected that as a basis for the expressive theory of punishment on the basis of its individual-centred and piecemeal approach to authority. Therefore, it might look as though the theoretical pressures inherent in the expressive theory push it in the direction of something like the Solomon model.

However, I do not think that this is the final word. I would like to see if we can provide an alternative account of state authority for the expressive theory by developing another aspect of Duff's position. The notion of crime as a public wrong is important in part because it directs attention from the authority of the state to the authority of the citizens as a body. Duff insists that one is answerable not merely to the state, but to one's fellow citizens for one's wrongs; the state is simply the mechanism by which one is made accountable to one's fellow citizens. Therefore, it is worth exploring the idea that rather than rejecting the traditional conception of authority as the right to rule, Duff's position can be seen as giving the right to rule to the body of citizens as a whole rather than the state. This would involve replacing the vertical authority structure from citizen to state with a horizontal relation from citizen to citizen.<sup>49</sup> I therefore want to conclude this paper by giving a very brief account of how the authority of democracy might provide an alternative to the Solomon model. Before we get on to this, though, I would like to draw together some of the various problems that have surfaced throughout the discussion, in particular to do with the notion of punishment as condemnation for a public wrong, and which the account of the authority of democracy, if it is to be allied to the expressive theory, will need to address.

#### A. *The Authority of the Common Project*

One problem lies in showing that modern political societies can legitimately be thought of as revolving around a common project. If it can successfully be shown that there is an authoritative common project to political societies, then this would establish that the body of citizens as a whole has inherent authority to condemn, and it would establish that the state might have a mediate right to condemn if it does so on behalf of its citizens as a body—that is, if in some way the citizens delegate their authority to condemn to the state. However, is there an authoritative common project in a modern society marked by disagreement and diversity? In considering this question, we should note that the term “common” can be a distraction. Strictly speaking, from Duff's perspective, the question is whether the project is authoritative, not whether it is common.<sup>50</sup> Even if not

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<sup>49</sup> See, e.g., CAROLE PATEMAN, *THE PROBLEM OF POLITICAL OBLIGATION: A CRITICAL ANALYSIS OF LIBERAL THEORY* (1979).

<sup>50</sup> Although Duff writes of the voice of the law being (or aspiring to be) “the voice of the community addressing itself,” DUFF, *PUNISHMENT*, *supra* note 3, at 60, his view of crimes as public wrongs carries with it the implication that the acts in question really are wrong and not simply what we think of (or can agree on) as wrong. Compare the discussion of domestic violence at DUFF,

everyone signs up to it, or recognises it as having a call on them, it might still be the case that the demands of the project are authoritative for them. Of course, Duff's claim about political community being non-manipulative requires that citizens are able to see the claims of the criminal law as justified—with sufficient reflection, say. The criminal law would be a common law, and its demands the demands of a common project, if it meets standards of reflective endorsement: even though many in society may not actually endorse it, if it is such that, after reflection, they would come to see it as a genuine requirement, then it is a common law. But it would need to be explained what such a project could be for a diverse modern society and indeed what it takes for the project to be authoritative.

*B. Reconciling "Public" and "Wrong" in Duff's Conception of Crime as Public Wrong*

Another issue involves saying what the common enterprise could be that ensures that the grounds for condemnation are morally relevant ones. In other words, how can we reconcile the claim that the public has the right to condemn fellow members by virtue of being together with them in a common enterprise, with the claim that in condemning, the state is condemning on the basis of relevant reasons? Duff's objection to content-independent reasons is that although they might, if the authority is justified, give *some* reason for condemnation, they do not give the real or most salient reason.<sup>51</sup> Therefore, the introduction of content-independence distorts the proper basis of condemnation and therefore fails to treat the offender as a rational agent. (We considered the same sort of objection previously, when we looked at the problem that a state founded on a contract would only be able to condemn crimes as breaches of contract, not as murder, rape, assault, theft, etc.) But the restriction that condemnation can only be made for a person's failings qua member of the common project threatens to have the same distorting role. An example might make this concern clear. Say one thinks of society as a common project in Rawlsian terms: as a cooperative enterprise for the fair distribution of "the benefits and burdens of social cooperation."<sup>52</sup> On such a view, the duties citizens owe to one another have to do with fair play: doing their fair share in the enterprise. However, if this were the nature of the common enterprise, then citizens would have the right to condemn one another for shirking. But it would seem that shirking is all that they would have the right to condemn

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PUNISHMENT, *supra* note 3, at 62 ("It should be condemned by the whole community as unqualifiedly wrong; and this is done by defining and prosecuting it as a crime.").

<sup>51</sup> Hence the claim about the lack of "transparency" on this conception. DUFF, PUNISHMENT, *supra* note 3, at 58.

<sup>52</sup> JOHN RAWLS, A THEORY OF JUSTICE 4 (rev. ed. 1999). See also John Finnis, *The Restoration of Retribution*, 23 ANALYSIS 131 (1972); Herbert Morris, *Persons and Punishment*, 52 MONIST 475 (1968), and Jeffrie G. Murphy, *Marxism and Retribution*, 2 PHIL. & PUB. AFF. 217 (1973), for an explanation of this famous approach to punishment.

one another for.<sup>53</sup> Each crime would be a variant on that theme, a failure to play one's part in the enterprise. Only failures to do one's fair share would be public wrongs in the sense that condemning them is the legitimate business of the other members of the project qua members of that project. Therefore, Duff needs to explain how the idea of "public wrong" can contain these two ideas that appear to be in tension: on the one hand, the idea of the public having a legitimate interest as fellow members of a common project, and, on the other hand, the idea that the crimes should be independently wrong.

*C. Does the State Need to Be an Epistemic Authority in Order to Have the Right to Condemn?*

A related problem with the idea of crime as public wrong is that it seems on the face of it that the citizens of the society in question would have to be an epistemic authority if they were to have the right to condemn. Or rather, since it is not the citizens themselves who condemn, it would appear that the state, or whoever determines the content of the criminal law, would have to be an epistemic authority regarding what citizens owe to one another or what can reasonably be expected of them by way of participation in the common project. If Duff's arguments against content-independent reasons are valid, then condemnation will only be justified if its content makes it so. Therefore, his account seems to need a role for a party who is able to provide an expert, authoritative view about what can reasonably be expected of citizens as members of the common project, and that this expert view should form the content of the criminal law. There is a question whether there is such an expert, and specifically whether those who do determine the content of the criminal law should be thought of as such.

IX. DEMOCRATIC COMMUNITY AS A SOLUTION TO THE PROBLEM OF POLITICAL AUTHORITY

Having set up the various problems that need to be addressed, I now want to briefly sketch one attractive model of political community that will give the requisite sort of authority to the state and will also avoid the problems associated with the Solomon model. This is the model of democratic community.<sup>54</sup> We can introduce this conception by setting out one role of the Solomon model of

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<sup>53</sup> See DUFF, TRIALS, *supra* note 3, at 211–13, where Duff makes this point against the fair-play/benefits-and-burdens approach in his discussion of the wrongness—and criminal character—of. See also Richard Dagger, *Playing Fair with Punishment*, 103 ETHICS 473 (1993); Richard Dagger, *Punishment as Fair Play*, 14 RES PUBLICA 259 (2008) (attempting to overcome such criticisms of this approach).

<sup>54</sup> Of course, what I provide here is the merest sketch of what might be of value in the idea of democratic community, and I do not pretend to be able to solve all of the problems facing one who seeks a coherent defence of democracy. For a good overview of these problems, see THOMAS CHRISTIANO, *THE RULE OF THE MANY: FUNDAMENTAL ISSUES IN DEMOCRATIC THEORY* (1996).

authority that could be shared by the model of democratic authority—that is, the role of being an adjudicator of competing views about what laws and policies the polity ought to adopt. So far, in discussing the Solomon model, we have said that Solomon gains the right to rule by virtue of his authority. But let us now say something further about what is involved in this. However culturally homogeneous one imagines the state over which Solomon rules to be, there will always be disagreement over what the right decision in any case is, what principles ought to inform the decision, and how those principles are to be weighted. In such a situation, the need for common governance implies the need for some process by which these disagreements can be resolved. This suggests the need for an adjudicator whose directives will settle the argument. Solomon gains this role because he is wise. However, we have to be careful how we understand “settling the argument.” It seems essential to Solomon’s filling the role of adjudicator that he should know what he is talking about: it would not be appropriate simply to select some legislative proposal at random. Solomon gets the job because it is known that he will deliberate seriously and that what he says will be worth listening to. But, of course, this is not to say that it will convince everybody. The deliverances of Solomon will not settle the argument in the sense that, after his judgement, no one will continue to hold a conflicting opinion about how he ought to have decided. Rather, they settle in the argument in the sense that because Solomon has the right to rule, those subject to his authority have exclusionary reason to take his deliverances as reason for action regardless of their opinion about how he ought to have decided. So Solomon is an adjudicator, and that consists in his having the right to settle the argument in the sense just specified, but his authority would be undermined if it were not the case that he deliberated seriously and delivered judgements that stand a good chance of being right a reasonable proportion of the time. Thus, his qualification for his role would be undermined either by flippancy or demonstrable incompetence.

As we have seen, the Solomon model of the wise adjudicator has its critics. And one of these critics is the democrat. The democrat criticises the Solomon model on the basis that it fails to recognise that the polity belongs to each of its (sane, adult) members equally.<sup>55</sup> If each member of the polity has an equal right to self-governance, then it is hard to see how they could delegate their right to rule over their own lives by handing it over to Solomon. That would simply be to give up the status of having the right to decide for oneself and instead assume the role of the child, allowing Solomon to do with them as he sees fit (albeit that they might attempt to advise him in his deliberations). Hence, the democrat seeks a model of state authority that allows each person to retain the dignity of having equal rights to self-governance. Nevertheless, the democrat might accept the need

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<sup>55</sup> See CHRISTIANO, *supra* note 17, at 75–100, for a discussion on democracy as the “public realization of equality.” Christiano appeals to justificatory factors other than the need to recognise the equal status of all citizens as co-owners of the state, such as the importance of advancing the interests of all equally, and the epistemic fallibility of individuals. However, both of these lines of argument seem too contingent to me to act as the fundamental justification of democracy.

for adjudication that drives the Solomon model. Indeed, following Duff, the democrat might insist that only when the decisions of the governing body can be considered as reasoned adjudications of competing alternatives, and only when the reasons for the decision are communicated to citizens, can the exercise of force by that governing body be compatible with due respect for citizens as beings with moral understanding. The only way to reconcile the need for common law justified to its citizens with recognition of their equal authority to govern, the democrat says, is to ensure that common governance takes place in a way that recognises each citizen's equal ownership of the mechanisms of governance. And that has to involve democracy, in which each person has an equal say in the making of law.<sup>56</sup>

From this line of thought we have the following tentative argument for the authority of democracy. 1) A polity in which there is disagreement about what laws there ought to be requires an adjudicator who settles the argument in the sense we discussed earlier and whose judgements are binding on all. 2) In order to retain authority, the deliberations of the adjudicator must be serious and not incompetent. The exercise of force can only be compatible with due respect for citizens as moral agents when it is justified to them by the reasons for which the adjudicator chose to make that law. But 3) in a polity in which each citizen is to be recognised as having equal right to self-government, and hence an equal say in the legislative process, the only adjudicator that can be appealed to—without at least some citizens being treated as though they have no right to have a say—is the vote of the body of citizens as a whole.<sup>57</sup>

I have reasons for describing this as a tentative argument, which I will come back to shortly. But first of all, consider whether the polity so described would have a place for an expressive institution of punishment, and whether such a polity solves some of the puzzles that we discovered in looking at Duff's view of crime as public wrong. First of all, the democratic polity sees its state (controlled by the people) as an adjudicator of its disagreements about the content of its law. Therefore, it sees its vote as in some sense an epistemic authority. This has the implication that the people must see the democratic process as a collective inquiry that comes to an end with a vote, rather than a factional battle in which each votes for her own interests. If the process of democratic deliberation were merely flippant, or if its results were incompetent, then it would lose its role as an adjudicator. Nevertheless, it is not the case that the people as a whole must be an

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<sup>56</sup> Compare Duff's support for the "republican liberal" approach to political community at DUFF, *supra* note 16, at 50 n.36. I take my own proposed solution to the problem to be not too far removed from what Duff is looking for.

<sup>57</sup> For a similar argument, see Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346 (2006), especially the argument for democracy from process-related reasons. Note, however, that Waldron is not concerned with the justification of authority as such, but rather with the legitimacy of judicial review. For a related account that does address the justification of authority, see Daniel Viehoff, *Procedure and Outcome in the Justification of Authority*, 19 J. POL. PHIL. (forthcoming 2011).

expert in the way Solomon is. For instance, it may be the case that the people as a whole do not track justice very well.<sup>58</sup> Perhaps from the perspective of getting it right, the state would be better off with a Solomon. But the collective vote is the only epistemic authority that has the right to adjudicate and therefore the right to rule. It has the right to adjudicate because some adjudication is necessary in order to bring citizens into a morally adequate relationship with one another and with the coercive power they exercise together, and only adjudication by the people as a whole will preserve the equal authority of each. It has the right to rule not by virtue of its wisdom but rather by virtue of its compatibility with the equality of all. The process of democratic self-governance therefore provides a common project for the polity, a project that is important for various different reasons. For one thing, it involves a collective inquiry into justice and the goods internal to such shared discussion. And for another thing, it brings citizens into an inherently important relationship with one another in which they treat each other as equal authors of the law.<sup>59</sup> Furthermore, this view also solves the problem I described as that of reconciling “public” and “wrong.” The problem was that for the expressive theory to be successful, it has to be shown that the state has the right to censure citizens for their wrongdoing, whereas if we make the right to censure relative to a citizen’s engagement in some specific common project, then it may be the case that the state will only have the right to censure for failure to play one’s part in the project and not one’s wrongdoing as such. The project of democratic self-governance solves this problem because the project involves collectively inquiring into the right basis for the law of the polity and abiding by the results of the adjudication. Therefore, as with Solomon, the condemnation of crime would in part refer to the fact that the offender had failed to respect the authority of the adjudication, but would also in part refer to the substantive reasons that resulted in that adjudicatory judgement and favoured the creation of that law. For these reasons I think that if the account of the authority of the democratic polity is successful, then it would indeed have a place for an expressive institution of punishment. If the democratic polity is appropriately respectful of individual autonomy, as my account of it suggests, then I think we would have shown, at least in sketch, that there is at least one attractive form of political community with which the expressive account of punishment is compatible.

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<sup>58</sup> I recognise that there are epistemic defences of democracy—one of which is offered by Mill. See MILL, *supra* note 12; see also JOHN STUART MILL, *Considerations on Representative Government* (1861), reprinted in ON LIBERTY AND OTHER ESSAYS, *supra* note 12, at 203. For a more modern account, see DAVID M. ESTLUND, *DEMOCRATIC AUTHORITY: A PHILOSOPHICAL FRAMEWORK* (2008). If such account succeeds, then of course that is all well and good for the argument I sketch here. But this cannot be the central defence of the authority of democracy. The epistemic defence of democracy would share with the Solomon model the assumption that whoever is the wisest should rule. It is simply a contingency that the people as a whole are the wisest. I think a democrat should reject the view that wisdom overrides individual autonomy. Individuals have rights to self-government, and a satisfactory justification of authority must find a way of recognising that.

<sup>59</sup> See Joshua Cohen, *Deliberation and Democratic Legitimacy*, in *THE GOOD POLITY: NORMATIVE ANALYSIS OF THE STATE* 17 (Alan Hamlin & Philip Pettit eds., 1989).



## X. CONCLUSION: SOME THOUGHTS ABOUT FURTHER WORK TO DO

Nevertheless, this remains a tentative conclusion, a suggestion for further research rather than a firm conviction. This is so because I recognise that there may yet be concerns about the success of the account of authority offered by the democratic theorist (at least as related by me here). The question at issue<sup>60</sup> can be raised if we ask ourselves why the autonomous individual with which the argument begins should consider herself bound by the decisions of her fellow citizens as a whole. I have argued that *if* there is to be social interaction under law then there is a need for an adjudicator to resolve disagreements about what that law ought to be. And perhaps law is necessary for morally adequate social interaction in the sense that it makes it possible for a range of the things that happen to people as a result of their interaction in society to be given a kind of order and justification, so that it is possible for citizens to see their point, and they are not simply confronted with chunks of dread contingency or fate or as an exercise of brute power. Once the need for an adjudicator is established then the democrat can argue that the only acceptable adjudicator would be the people as a whole having an equal say. However, I can imagine a critic who continues to doubt that the authority of the adjudicator has thus been established, even if that adjudicator is the people. The problem is whether these considerations make it the case that the free individual has an obligation to contribute to the process of democratic deliberation and to abide by its results, in the sense that the state would be justified in coercively condemning her should she fail to do so. I can imagine a critic allowing that such a democratic state would be a “good thing” and that individuals ought not to interfere with its workings—perhaps they ought even to give it limited support. But such a critic might deny that citizens thereby have a duty of allegiance to the state, and hence arguing that the state will not have the authority to dictate and to coercively condemn unless in some way the free individual *accepts* her role in that project of collectively making binding law. If she does so, then the problem of authority is solved: but once we appeal to individuals’ *acceptance* of the democratic project, and not simply to the *existence* of that project, then we admit that it is not simply democracy that has the authority. The critic might argue, in other words, that the democratic argument provides a necessary condition for the justification of authority but deny that it is enough by itself to establish the authority of the people, or to explain why the people have a right to rule over themselves, and thus to rule over each individual member. In order to establish the authority of the people, the critic says, it would be necessary to suppose that the people had, through an act of contract or consent, willingly delegated their right to rule to the adjudicator. It might then be argued that it is only by delegating their authority to the people as a whole rather than to a Solomon that each person

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<sup>60</sup> Of course, I recognise that there are many other problems with the democratic account, not least whether it is compatible with political representation, and, if it is not, whether it can be at all relevant to large-scale, modern societies.

thereby retains authority in themselves, or at any rate, retains an equal authority with each of their fellows. But that initial act of delegation is necessary in order to make the authority of the adjudicator compatible with the autonomy of those subject to it. Therefore, the democratic argument does not work by itself.

Of course, this may not be a desperate conclusion. After all, even if valid, this final criticism might simply be viewed as an invitation further to pursue the issues facing consent theory or the combination of consent and democratic theory.<sup>61</sup> I conclude on this note because I cannot but recognise that the democratic account as I have offered it here is sketchy and requires more work. However, if I have convinced the reader that it represents an alternative to the Solomon model, one that would avoid the problems of paternalism and the overriding of legitimate individual autonomy, then I might have succeeded in convincing the reader that the expressive theory is more applicable to our most attractive ideals of political community than she previously thought.

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<sup>61</sup> See, e.g., MICHAEL WALZER, *OBLIGATIONS: ESSAYS ON DISOBEDIENCE, WAR, AND CITIZENSHIP* (1970); Mark E. Warren, *Deliberative Democracy and Authority*, 90 AM. POL. SCI. REV. 46 (1996).